CANADIAN ENVIRONMENTAL ASSESSMENT ACT FIVE YEAR REVIEW

PROVINCIAL AND TERRITORIAL INPUT

RECOMMENDATIONS REPORT

RECOMMENDATIONS REPORT OF PROVINCES AND TERRITORIES: CHANGES TO THE PROVISIONS AND IMPLEMENTATION OF THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT (CEAA)

INPUT INTO THE CEAA FIVE YEAR REVIEW

APRIL 2000

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CEAA FIVE YEAR REVIEW
PROVINCIAL AND TERRITORIAL INPUT

RECOMMENDATIONS REPORT OF PROVINCES AND TERRITORIES: CHANGES TO THE PROVISIONS AND IMPLEMENTATION OF THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

All provinces (except Quebec) and territories support these recommendations for changes to certain provisions and aspects of the implementation of the *Canadian Environmental Assessment Act* (CEAA). This report has been submitted to the federal Minister of the Environment on behalf of provincial and territorial ministers responsible for the environment. The recommendations are derived from four principal sources:

- the case studies prepared by provinces and territories regarding their experience with the application of CEAA;
- the historical concerns of the provinces and territories about CEAA;
- the background paper commissioned for the provincial/territorial initiative; and
- the document prepared by the Canadian Environmental Assessment Agency, *Review of the Canadian Environmental Assessment Act: A Discussion Paper for Public Consultation* (federal discussion paper).

Provincial and territorial concerns are clustered around three major themes:

I. Jurisdiction
II. Application of CEAA
III. Procedure.

While the CEAA Five Year Review and the review of the CCME *Canada-Wide Accord on Environmental Harmonization* (Accord) are separate, the relation between the two reviews cannot be overlooked. Since the Accord came into effect, January 29, 1998, a few years after CEAA was drafted, it reflects more recent thinking on the federal-provincial/territorial dimension. What results from the CEAA review will have implications for the Accord. Accordingly, while the major focus at this point is the CEAA review, the Accord and its central message of partnership must be remembered.

Without diminishing the importance of the Accord, the logical next steps in the evolution of a cooperative approach to environmental assessment (EA) are amendments to CEAA. Among other things, these amendments to CEAA should incorporate the vision, purpose, objectives and principles of the Accord. With respect to EA, the Accord's intent is clear. The one-window approach means "a single assessment and a single review process which may involve more than one jurisdiction".

If implemented, the recommendations in the three theme areas outlined below will achieve:

1. Recognition and respect for the constitutional position of provinces and territories as managers of their natural resources.
2. Recognition and respect for the expertise and capability that provinces and territories contribute as the lead parties to EA on provincial and territorial lands and as full partners generally in the field of EA.
3. Capability to accommodate results of broader provincial or territorial planning processes, innovation in technology and decision making, and research and feasibility projects.
4. Optimum use of scarce public resources in conducting and managing EA through the reduction of duplication and overlap and the introduction of process efficiencies.
5. Certainty in the application of the federal law so that provinces and territories can accurately predict federal process expectations and outcomes.

I. Jurisdiction

The dominant theme in the case studies is the provincial/territorial concern over jurisdiction. Environment is an area of shared responsibility and this reality needs to be better reflected in CEAA. CEAA should be amended to recognize and respect more fully the constitutional roles and responsibilities of provinces and territories in EA.

- **RECOMMENDATION 1**

  Amend CEAA to add a recital which recognizes the shared responsibility and which builds on the principles of partnership and cooperation of the Accord, and incorporates these principles in the purpose provision (section 4) of the Act.

- **RECOMMENDATION 2**

  Add a federal-provincial/territorial part which incorporates:

  - the federal-provincial/territorial provisions already contained in CEAA,
  - policy matters which have been identified as a result of the provincial/territorial experience with CEAA, and
  - the principles of the Accord and its sub-agreements.

- **RECOMMENDATION 3**

  In the federal-provincial/territorial part, agreements could be concluded in the following specified areas:

  - equivalency, achieved through "mutual recognition" or "deeming";
  - role of the agency;
  - minimum federal involvement;

- process for establishing a lead government and use of that government's review process;
- cooperative scoping;
- delegation to the province;
- project specific workplans;
- special situations (circumstances) arising from innovation, technological developments or new approaches to EA such as regional planning;
- dispute resolution ranging from required consultation to mediation to alternative dispute resolution; and
- other matters identified as necessary for effective cooperation.

Much of this new part would be enabling because it would become operative only after the conclusion of federal-provincial/territorial bilateral agreements. To ensure maximum flexibility, agreements under this new part can be either comprehensive, thematic or project specific. Provisions pertaining to dispute resolution could be both enabling (e.g., included in an agreement concluded under this new part) and mandatory. The part is proposed as the best way of acknowledging and administering the jurisdictional overlap. By providing for a full range of bilateral agreements under CEAA, there is recognition that within Canada "one size does not fit all".

There is no doubt that equivalency (the acceptance of a provincial EA process as fulfilling the requirements of the federal process, leaving decision making to each jurisdiction based on the results of the process) is both a contentious and long standing policy question. Two possible ways to establish equivalency are:

- mutual recognition through intergovernmental agreement, and
- give the Minister discretionary authority under CEAA to determine if a requirement is equivalent (deeming) analogous to a provision found in the *Ontario Environmental Assessment Act*.

Agreements concluded under the proposed federal-provincial/territorial part may include provisions for dispute resolution for the purposes of that specific agreement. In addition, CEAA should include general provisions for consultation and dispute resolution other than mediation. (Also see recommendations under "Procedure", below.) An example where consultation should be mandatory is in the exercise of the Minister's discretionary authority under section 25. Before the Minister refers a project to a panel, there should be an opportunity for provincial/territorial consultation.

- **RECOMMENDATION 4**

  Amend section 25 of CEAA to provide for mandatory federal-provincial/territorial bilateral consultation before the exercise of the Minister's discretionary powers and add a more general provision to CEAA to provide provincial/territorial governments with the opportunity to request bilateral consultations with the federal Minister with respect to specific projects.

EA is an essential policy tool for evaluating "projects". As more experience is gained with EA, how it relates to other policy tools such as regional development or land use planning inevitably arises. That a connection exists is self-evident. The challenge is how to factor a land use or regional development plan undertaken by a province or territory into EA. In part, the answer depends on how, when, and by whom the plan was developed. Given the jurisdictional sensitivities over land and resources, CEAA should allow for agreements in this general area with the understanding that, if the federal government has been involved in the provincial/territorial planning process, federal decision makers in any future CEAA review must recognize and not repeat the advance work. (Also see discussion under "Application of CEAA", below.) Project specific EA is not a regional planning process.

The federal-provincial/territorial part should allow for flexibility, adaptation and experimentation and should provide a framework for intergovernmental cooperation. It builds on the Accord and thus would assist in eliminating duplication. It would also reduce intergovernmental conflict and should lead to fewer court challenges. In summary, it has the capacity to demonstrate that federalism works. The new part should build on the existing provision for agreements but focus on jurisdictional shared responsibility.

II. Application of CEAA

Recommendations regarding the application of CEAA are rooted in jurisdictional concerns and the recognition that EA is a constantly evolving tool.

The provinces and territories support the use of CEAA to conduct EA in a manner to assist federal decision makers. It should be applied to legitimate federal matters consistent with the federal jurisdiction and should be utilized as a tool to assist in better planning for single projects, as opposed to a regional planning or a regulatory tool.

Provinces and territories do not believe that the design and implementation of the "Law List" consistently achieves the objective of identifying legitimate federal projects and projects worthy of a full EA to assist better project planning and design.

(i) The "Law List" Triggers

The current "Law List" should be refined through a review of whether certain regulatory triggers can and should prompt the kind of review necessary for better project planning. For example, should minor stream crossings that do not result in fisheries habitat disruption, but require a permit under the *Navigable Waters Protection Act* be on the "Law List"? The information required to issue the permit is detailed design information, as opposed to project planning conceptual information.

- **RECOMMENDATION 5**

  Remove permits from the "Law List" that are more suited to a regulatory review as opposed to a full EA (e.g., certain *Navigable Waters Protection Act* permits).

Currently, due to the application of CEAA, certain small-scale routine projects or projects representing a minimal federal jurisdiction require a full EA under CEAA. This is a questionable use of public and private resources for minimal value to the decision making.

◆ **RECOMMENDATION 6**

Support all options outlined in the section 7.2 of the federal discussion paper.

- Through legislative change, enable federal departments to exclude small routine projects from review under CEAA.
- Amend the current legislation to enable the effective exemption of projects with minimum federal involvement by later regulation.
- By regulation, expand the current exclusion list to add projects where there is no potential for significant adverse effects.
- Develop legislative capability to support development and implementation of efficient class screenings through regulation that are consistent with the approaches used by provinces.

(ii) Application of CEAA to Indian Reserve Lands

There is some concern provincially that CEAA is not being applied in a manner consistent with its original objectives. In particular, there has been a technical problem with the application of CEAA to projects on Indian Reserve Lands. Provinces support the original legislative intent of CEAA, requiring project assessment on these lands, to fully ensure proper management of provincial resources.

◆ **RECOMMENDATION 7**

Apply CEAA to projects on Indian Reserve Lands through regulatory change, adopting option 3 of section 8.1 of the federal discussion paper.

(iii) Legislative Flexibility to Promote Better Decision Making and Use of Public Resources

CEAA is a prescriptive enactment with little flexibility. There is flexibility to include projects not caught under the triggers. There is a need to add parallel flexibility to exercise exemptions for projects or application of certain provisions of CEAA under conditions. The conditions could be set in legislation or by agreement to accommodate the development of these concepts on a case by case basis. The approach would accommodate evolving trends in the field of EA, prevent barriers to the provincial/territorial development of innovative tools (both decision making approaches and technical procedures) for resource management planning and sustainable development planning and the undertaking of pilot or research projects.

Where the public and federal government have been involved in processes to establish regional resource use and sustainability strategies, the need for project specific EA and cumulative effects analysis on issues already addressed by the provincial planning process for federal decisions becomes redundant. There is currently no ability to adjust or tailor the requirements of CEAA so that issues that have been addressed and resolved with parties who have an interest in the review do not have to be re-addressed a second time. This is especially relevant where regional assessment data collection and decisions have been made. Similarly, technology could evolve making current legislative requirements obsolete. Finally, where projects designed to re-establish natural habitats are proposed or pilots to determine feasibility, they may trigger CEAA. While involvement of federal decision makers in the pilot or feasibility determination could be essential, there needs to be flexibility for an adaptive management approach based on best practices. The constraints of rigid, narrow regulatory approvals, may work to prevent the best outcomes for management of such projects.

- **RECOMMENDATION 8**

  Develop a legislative provision to establish conditions or a process to allow for the exemption of the application of CEAA, aspects of CEAA or issues already addressed by other processes. This would include flexibility for certain projects or situations.

Adjustments to the application of CEAA would be made for:

- projects or aspects of projects already considered within other processes such as planning and allocation processes;
- projects proposed for regions where full regional assessment have been conducted and cumulative effects have been addressed on a regional basis;
- research and pilot projects designed to determine whether a project is feasible or to restore the environment; and
- technological innovations or innovations in project management and decision making.

(iv) Minister's Discretionary Powers

Currently, under section 28 of CEAA, the Minister may refer any project (not requiring a review due to the section 5 triggers) to a panel or mediation based on the potential for significant adverse effects or public concern. Since a panel review may have implications for the provinces and territories, the federal government should consult with the province or territory where the project is located.

- **RECOMMENDATION 9**

Amend section 28 of CEAA to clarify that the discretionary power of the Minister is restricted to projects within federal jurisdiction and to require mandatory consultation with the appropriate province or territory.

III. Procedure

(i) Timeliness

Federal departments do not always identify CEAA triggers early in the development of a project or early in a provincial review process. When CEAA is invoked during, or at the conclusion of a provincial review, this may extend the time required to complete a provincial review or may delay the start of a project that has already received provincial approval. This creates uncertainty and limits the effectiveness of EA as a planning tool because, late in a review process, many of the planning decisions have already been made.

The provinces and territories support using CEAA as a *project specific* planning tool. Allowing information requirements for the EA to require planning level detail, rather than the detail required for licensing approval, would facilitate early involvement and decision making. The more detailed regulatory matters can be addressed when those authorizations are issued for approvals, permits, certificates and licenses.

Provinces support early participation by federal departments in federal/provincial reviews if it is certain that CEAA applies or if there is likelihood that CEAA applies. In the latter case, if it became clear that CEAA did not apply, the federal department(s) could formally declare this, withdraw from the review and could not re-enter the review at a later date.

- **RECOMMENDATION 10**

  Amend CEAA to give greater emphasis to the use of CEAA as a project specific planning tool so that federal departments make CEAA decisions on planning level information and trigger CEAA early in the project cycle through:

  - amendment of the purpose provision of CEAA (section 4) to provide that the focus of EA is on project planning to assist federal decision making, and

- support for the directions to be set by policy as outlined by the federal discussion paper 7.3, through a combination of options 1 and 3.

(ii) Timelines

Federal department delays in delivering their responsibilities under CEAA have led to extensions of provincial timelines for projects subject to federal and provincial EA legislation. Timelines for completion of a CEAA review are not prescribed by legislation or regulation. Provincial reviews are conducted according to timelines which are either set by regulation or negotiated at the start of a review.

RECOMMENDATION 11

Empower the Agency by legislation to enter into agreements with provinces and territories to establish project review workplans and common timelines, including timelines for the completion of comprehensive studies, by adopting provincial timelines or negotiating them on a project by project basis.

(iii) Duplication

Duplication arises where certain federal and provincial EA requirements are similar and are both applied to the review of a project. The same project information is requested independently by each level of government and each government commits time and resources to review similar information. This is not an efficient use of budgets and human resources. It also means that there may be gaps in the EA that could be filled if there was a better distribution of federal and provincial review responsibilities during an EA.

The potential for duplication also exists in the area of public consultation. Provincial EA procedures provide greater opportunity for public involvement than are currently offered through CEAA. Changes are needed to CEAA to create opportunities for strengthening public participation in the federal EA process but this must not create two sets of consultation procedures for the review of one project. Discretion or flexibility

within the federal system is needed to ensure that the federal process can adopt provincial consultation requirements to achieve a common objective.

- **RECOMMENDATION 12**

  Establish a provision that gives a strong coordinating role to the Agency (enabling provision outlined under "Jurisdiction", above) to ensure that federal involvement in a federal/provincial/territorial review achieves the goal of "one project - one assessment". Subsequent agreements should also allow for the completion of a "gap analysis" to ensure the EA covers all issues once rather than missing some issues and covering other issues several times.

- **RECOMMENDATION 13**

  Amend legislation to provide flexibility so that in cooperative reviews, one set of enhanced public consultations will be held for both reviews and will rely on the provincial process. This supports the directions established by the federal discussion paper, section 9.1, options 1 and 2.

- **RECOMMENDATION 14**

  Establish the requirement (through regulation) for a mandatory project and document index for all federal screenings.

(iv) Coordination

The provinces and territories support the need for a single federal coordinating agency for the federal input to reviews. The function of the coordinator would be to administer and manage the process aspects of the federal EA process. The coordinator should be the Agency or other organization that is capable of taking on the role and designated by the Agency (e.g., National Energy Board in Alberta, Department of Fisheries and Oceans or Environment Canada in Newfoundland). The model would build on a combination of options 2 and 4 as outlined in section 7.1 of the federal discussion paper.

Responsible authorities would continue to have the substantive policy and legal authority for decision making underlying self assessment; the Agency (or designate) would have the lead on administration and process.

- **RECOMMENDATION 15**

  Enact a legislative provision to provide the Agency or its designate with the review process management and administrative powers to:

  - encourage early declaration of a federal review;
  - facilitate timely sharing of information amongst federal departments;
  - coordinate and synthesize federal information requirements;
  - facilitate clear and early scoping for assessment;
  - ensure departmental accountability for process and informational requirements and quality review input;
  - ensure consistent application of process policy; and
  - proactively resolve issues and conflicts amongst federal departments due to competing or conflicting informational and/or process requirements.

(v) Dispute Resolution

Disputes in EA may be due to process or substantive issues. Both require resolution prior to an EA being successfully completed.

- **RECOMMENDATION 16**

Enact a legislative provision to empower the Agency (or designate) to resolve federal process disputes by taking the lead role to:

- resolve review conflicts in cooperative reviews with the provincial lead party; and
- work on issue resolution models beyond mediation currently provided under CEAA for substantive issues, on a policy basis adopting the directions of option 3, section 9.1 of the federal discussion paper.

(vi) Certainty and Predictability

Definitions

Since its enactment, the federal courts have had an opportunity to review CEAA's provisions on scoping. The litigation under CEAA has been a concern. However, now that the courts have been involved, the question becomes whether the courts' determinations should become the basis for legislative change. One option is to define terms ("scope of project", "scope of assessment" and "cumulative effects") to reflect the courts' interpretation as a result of the *Friends of the West Country Association vs. Minister of Fisheries and Oceans* (Sunpine) and the *Manitoba's Future Forest Alliance vs. Canada (Minister of the Environment)* (Tolko) decisions. This option incorporates parts of option 1 of section 7.4 and option 1 of section 8.2 in the federal discussion paper.

The other option is to apply the results of the courts' decisions through policy directives under CEAA, because a rewrite invites further challenges. This option incorporates aspects of option 2, section 7.4 and option 3, section 8.2 of the federal discussion paper. In this approach, the Agency could assist in setting policy directives and work cooperatively with provinces to establish a scope of project and assessment for projects requiring a federal and provincial review. (See discussion on "Coordination" above.) Either

alternative involves an element of risk to obtaining certainty. The first option is the preferred one, however, if this option cannot be achieved, the second one must be achieved.

- **RECOMMENDATION 17**

  Seek legislated definitions for "scope of project", "scope of assessment" and "cumulative effects assessment", to reflect the courts' interpretation of CEAA as a preferred option. Pursue securing firm policy directions for definitions from the Agency as a less preferred alternative.

Early Process Decision on Comprehensive Studies

Where projects are undergoing a comprehensive study, provinces and territories have identified the need for the federal process to determine whether that project review will be completed as a comprehensive study or be referred to a panel. This decision should be made early in the process so that the provinces and territories understand review expectations. Once the choice has been made for a comprehensive study, the project assessment cannot be later referred to a panel. A "point of no return" is necessary.

- **RECOMMENDATION 18**

  Amend the legislation to provide Minister with capability to determine early in the review and as a final decision, the course of review for a project that triggers a comprehensive study as either a comprehensive study or a panel review. This recommendation is based on the federal discussion paper section 7.6, option 2.

Summary of Recommendations

Provincial and territorial concerns with CEAA are clustered around three themes:

I. Jurisdiction

II. Application of CEAA

III. Procedure.

Recommendations have been developed to respond to these concerns. If implemented, the recommendations will significantly improve CEAA. They will provide:

1. Recognition and respect for the constitutional position of provinces and territories as managers of their natural resources.

2. Recognition and respect for the expertise and capability that provinces and territories contribute as the lead parties to EA on provincial and territorial lands and as full partners generally in the field of EA.

3. Capability to accommodate results of broader provincial or territorial planning processes, innovation in technology and decision making, and research and feasibility projects.

4. A strong basis for optimum use of scarce public resources in conducting and managing EA through the reduction of duplication and overlap and the introduction of process efficiencies.

5. Certainty in the application of the federal law so that provinces and territories can accurately predict federal process expectations and outcomes.

I. Jurisdiction

- **RECOMMENDATION 1**

  Amend CEAA to add a recital which recognizes the shared responsibility and which builds on the principles of partnership and cooperation of the Accord, and incorporates these principles in the purpose provision (section 4) of the legislation.

- **RECOMMENDATION 2**

Add a federal-provincial/territorial part which incorporates:

- the federal-provincial/territorial provisions already contained in CEAA,
- policy matters which have been identified as a result of the provincial/territorial experience with CEAA, and
- the principles of the Accord and its sub-agreements.

- **RECOMMENDATION 3**

In the federal-provincial/territorial part, agreements could be concluded in the following specified areas:

- equivalency, achieved through "mutual recognition" or "deeming",
- role of the agency,
- minimum federal involvement,
- process for establishing a lead government and use of that government's review process,
- cooperative scoping,
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- project specific workplans,
- special situations (circumstances) arising from innovation, technological developments or new approaches to EA such as regional planning,
- dispute resolution ranging from required consultation to mediation to alternative dispute resolution, and
- other matters identified as necessary for effective cooperation.

◆ **RECOMMENDATION 4**

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II. Application of CEAA

The Law List Triggers

◆ **RECOMMENDATION 5**

Remove permits from the "Law List" that are more suited to a regulatory review as opposed to a full EA (e.g., certain *Navigable Waters Protection Act* permits).

◆ **RECOMMENDATION 6**

Support all options outlined in the section 7.2 of the federal discussion paper.

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- By regulation, expand the current exclusion list to add projects where there is no potential for significant adverse effects.
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Application of CEAA to Indian Reserve Lands

- **RECOMMENDATION 7**

  Apply CEAA to projects on Indian Reserve Lands through regulatory change, adopting option 3 of section 8.1 of the federal discussion paper.

Legislative Flexibility to Promote Better Decision Making and Use of Public Resources

- **RECOMMENDATION 8**

Develop a legislative provision to establish conditions or a process to allow for the exemption of the application of CEAA, aspects of CEAA or issues already addressed by other processes. This would include flexibility for certain projects or situations. Adjustments to the application of CEAA would be made for:

- projects or aspects of projects already considered within other processes such as planning and allocation processes;
- projects proposed for regions where full regional assessment have been conducted and cumulative effects have been addressed on a regional basis;
- research and pilot projects designed to determine whether a project is feasible or to restore the environment; and
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Minister's Discretionary Powers

- **RECOMMENDATION 9**

Amend section 28 of CEAA to clarify that the discretionary power of the Minister is restricted to projects within federal jurisdiction and to require mandatory consultation with the appropriate province or territory.

III. Procedure

Timeliness

- **RECOMMENDATION 10**

Amend CEAA to give greater emphasis to the use of CEAA as a project specific planning tool so that federal departments make CEAA decisions on planning level information and trigger CEAA early in the project cycle through:

- amendment of the purpose provision of CEAA (section 4) to provide that the focus of EA is on project planning to assist federal decision making, and
- support for the directions to be set by policy as outlined by the federal discussion paper, section 7.3, through a combination of options 1 and 3.

Timelines

- **RECOMMENDATION 11**

Empower the Canadian Environmental Assessment Agency (Agency) by legislation to enter into agreements with provinces and territories to establish project review workplans and common timelines, including timelines for the completion of comprehensive studies, by adopting provincial timelines or negotiating them on a project by project basis.

Duplication

- **RECOMMENDATION 12**

Establish a provision that gives a strong coordinating role to the Agency (enabling provision outlined under "Jurisdiction" section, above) to ensure that federal involvement in a federal/provincial review achieves the goal of "one project - one assessment". Subsequent agreements should also allow for the completion of a "gap analysis" to ensure the EA covers all issues once rather than missing some issues and covering other issues several times.

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Coordination

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- ensure consistent application of process policy; and
- proactively resolve issues and conflicts amongst federal departments due to competing or conflicting informational and/or process requirements

Dispute Resolution

- **RECOMMENDATION 16**

Enact a legislative provision to empower the Agency (or designate) to resolve federal process disputes by taking the lead role to:

- resolve review conflicts in cooperative reviews with the provincial lead party; and
- work on issue resolution models beyond mediation currently provided under CEAA for substantive issues, on a policy basis adopting the directions of option 3, section 9.1 of the federal discussion paper.

Certainty and Predictability

- **RECOMMENDATION 17**

Seek legislated definitions for "scope of project", "scope of assessment" and "cumulative effects assessment", to reflect the courts' interpretation of CEAA as a preferred option. Pursue securing firm policy directions for definitions from the Agency as a less preferred alternative.

- **RECOMMENDATION 18**

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Provincial/Territorial Recommendations for Changes to the Provisions and Implementation of the *Canadian Environmental Assessment Act*

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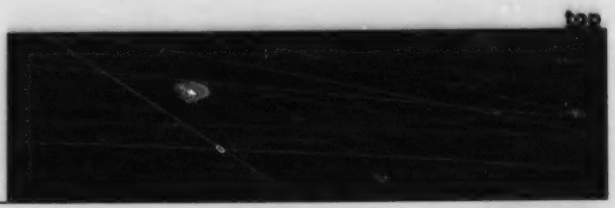

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